IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01/11/2002

Coram

The Honourable Mr. Justice V.S. SIRPURKAR

W.P. No.7545 OF 1995

M/s. Madras Fertilisers Limited
Manali, Madras, rep. by its
General Manager, Mr. R.R. Pandalai ..... Petitioner

-Vs-

1. The Controlling Authority
under the Payment of Gratuity Act
Assistant Commissioner of Labour
(Gratuity), Office of the Deputy
Commissioner of Labour II, Labour
Welfare Board Buildings
Chennai-6

2. The Deputy Commissioner of Labour
(Appeals) – Appellate Authority
under the Payment of Gratuity Act
Office of the Commissioner of
Labour, Labour Welfare Board
Buildings, Madras-6

3. The Management of Bharath
Transport, Madras

4. N.E. Nilavazhagan
5. C. Gunasekaran
6. S. Anthony
7. P. Paramasivam
8. C. Pandiyan
9. P. Rajendran
10. M. Ramalingam
11. K. Dayalan
12. T. Badrachalam
13. George V. Philips
14. G. Elumalai
15. R. Manoharan
16. C. Ganesan
17. S. Varadan
18. S. Veeraraghavan
19. V.K. Vaidyalingam

20. S. Kalyanasundaram
21. C. Selvaraj
22. C. Dhakshnamoorthy
23. V. Venkatesan
24. S. Muralidharan
25. P. Nethaji
26. P. Kapali
27. G. Easu Patham
28. E. Mohan
29. G. Selvaraj
30. N. Govindasamy
31. R. Duraivelu
32. G. Easuadiyan
33. A.P. Ethiraj
34. S.R. Raman
35. M. Alphonse
36. T.R. Samy
37. G. Radhakrishnan
38. M. Nallamal
39. G. Yasodha
40. V. Murugesan
41. N. Nithyanandam
-Respondents 4 to 41 are
C/o INTUC, Madras-14 ..... Respondents

Petition under Art.226 of the Constitution of India
praying for a Writ of Certiorarified Mandamus
as stated in the petition

!For Petitioner ... Mr. AL. Somayaji, S.C.
For Aiyar & Dolia

^For Respondents ... P. Chandraseakaran
for R1 and R2
Mr. M. Udayakumar for R3
Mr. N.G.R. Prasad for
R4 to R41

:ORDER
Petitioner in this writ petition questions the two orders passed by the authority under the Payment of Gratuity Act as also the appellate authority thereunder, fixing the liability of payment of gratuity of respondents 4 to 41 on the petitioner. Shortly stated, the case of the petitioner is that the petitioner is an industry having a factory. It is also a Government of India Public Sector Undertaking. It manufactures fertilisers. It has a staff of 1600 persons including 85 0 workmen.

2. Under a policy decision, the petitioner entrusted the work of loading the fertiliser-bags to the third respondent – an independent contractor. It is the admitted case that the third respondent is the

registered contractor and has a licence under Sec.10 of the Contract Labour (Regulation and Abolition) Act, 1970 (in short the ' Contract Labour Act'). This work was entrusted in the year 1986 and the third respondent was entitled to be paid on tonnage basis in respect of the work turned out. In short, it is the case of the petitioner that the third respondent was obliged to perform the duties of product handling, loading and house-keeping, etc. Respondents 4 to 41 have been engaged by the third respondent and it is in respect of these respondents alone that the present writ petition has been filed. It is pleaded that these respondents sent Form I to the third respondent claiming gratuity under the Payment of Gratuity Act, 1972 (in short ' Gratuity Act') on their retirement. They also made an application informing the first respondent during the year 1989 seeking a direction for payment of gratuity since that was not paid by the third respondent. In all these applications, it was only the third respondent which was mentioned as the 'employer'.

3. During the pendency of the application and after recording the workmen's evidence, the third respondent took out an application for impleading the petitioner as a party to the said proceedings. The first respondent ordered the impleadment of the petitioner as a party. Petitioner disputed its responsibility on the ground that there was no jural relationship of master-servant between the petitioner and respondents 4 to 41. A preliminary objection was raised to the effect that the application was not maintainable before the first respondent. Respondents 4 to 41 withdrew the application to seek remedy before the authority constituted by the Central Government under the Act and preferred an application in Form-N before the Assistant Regional Labour Commissioner (Central) seeking a direction to the third respondent to pay the gratuity. The application came to be registered. However, after hearing the parties, the Assistant Regional Labour Commissioner came to the conclusion that the applications were not maintainable before him and dismissed the applications but granted liberty to the respondents 4 to 41 to approach the first respondent for claiming gratuity from the third respondent. Respondents 4 to 41 did not demur with this order and filed fresh application in Form-N before the first respondent. Third respondent filed its counter wherein it had admitted the master-servant relationship between the third respondent and respondents 4 to 41. The third respondent only had disputed the service particulars. The petitioner also filed a detailed counter disputing the claim of the respondents 4 to 41 in so far as it was claimed against the petitioner on the ground that there existed no master-servant relationship. However, by order dated 31-8-1994, the first respondent held that the third respondent was not an ' establishment' within the meaning of the Contract Labour Act and since the petitioner fell within the purview of the Act, it had to be deemed that the petitioner was providing employment to respondents 4 to 41. It also came to the conclusion that the third respondent could not be considered to be the employer.

4. The petitioner filed an application on 27-6-1994 before the first respondent for summoning the third respondent as witness and also to produce documents. That application also came to be dismissed on the ground that the application was unnecessary. In fact, a request was also made by respondents 4 to 41 by filing an application before the first respondent for directing the third respondent to produce wage register, attendance register,

PF records, etc. However, no orders came to be passed on that application also. The PF returns and PF nominations, etc. were, however, filed by the third respondent which were available with the third respondent. By the aforementioned order dated 31-8-1994, the petitioner was ordered to pay the gratuity. Appeals came to be filed against this order vide Appeal Nos.86 to 123 of 1994. However, the appellate authority also dismissed the above appeals, confirming the orders of the first respondent holding that it was not the responsibility of the third respondent at all but the responsibility of the petitioner to pay the gratuity.

5. Learned Senior Counsel appearing on behalf of the petitioner, Mr. A.L. Somayaji, firstly contended that both the orders under challenge were patently illegal and erroneous as the authorities had committed the basic errors. The main contention of the petitioner was that it was apparent on the face of the record itself and an admitted position that firstly, the third respondent was a licensed contractor under the provisions of Contract Labour Act. It was also pointed out by the learned counsel that it was the third respondent who had engaged the respondents 4 to 41 and it was the third respondent who was not only making the payment of salary to the said respondents but also maintaining all the records like PF Registers, Attendance Registers, etc. Learned senior counsel took me through the initial pleadings as also through the documents to suggest that at every point of time, respondents 4 to 41 had claimed the third respondent to be their master and employer and that there was no actual jural relationship of master-servant between the petitioner and respondents 4 to 41. Carrying on his arguments further, learned senior counsel pointed out that even in the pleadings it was an admitted case even by the third respondent initially that the third respondent was the master and that it was only by way of a desperate attempt that the third respondent had taken a complete somersault to plead that it was the responsibility of the petitioner. I was taken through the documents like Form I and the application forms filed by respondents 4 to 41 and from that it was pointed out that right from the beginning it has been the case of the respondents 4 to 41 that they were the servants of the third respondent. Learned counsel also took me through the orders passed by the authorities below and pointed out that the very basis of these orders is wholly incorrect.

6. As against this, the learned counsel for the third respondent substantiated the orders and contended that it was not the responsibility of the third respondent as in fact, the whole liability lay with the petitioner as it was for them that respondent 4 to 41 were working. Learned counsel contended that the said workers though were engaged by the third respondent were actually working in the petitioner’s factory. He thus opposed the claim of the petitioner.

7. Learned counsel for the respondents 4 to 41, however, took the position that he was not concerned with the fight in between the petitioner and the third respondent but, at any rate, the respondents were liable to be paid the gratuity by the principal employer, i.e. the petitioner in case the immediate employer, i.e. the third respondent failed to make the same. In this behalf, Mr. Prasad, relied on Sec.21 (4) of the Contract Labour Act. He, therefore, contended that the total liability to begin with lay with the petitioner as admittedly the third respondent had failed to make

the payment of wages and according to him the gratuity amounted to wages.

8. On this backdrop, it has to be seen firstly as to whether the petitioner could be said to be the 'employer' and as such could be held liable to make the payment of gratuity or whether it would be the liability of the third respondent; secondly, if, ultimately, it is held that it is the liability of the third respondent whether the respondents were justified in claiming the gratuity on the basis of Sec.21(4) of the Contract Labour Act.

9. Considering the first question, it will have to be seen whether the liability to pay the gratuity rests with the third respondent who was the immediate employer or with the petitioner. There can be no dispute, at least on facts, that the petitioner was not the immediate employer of respondents 4 to 41. They were indeed employed by the third respondent contractor. There is enough evidence on record to hold so. It is an admitted position that even respondents 4 to 41 submitted their Form-I to the third respondent. In their applications in the prescribed form also they have mentioned the third respondent as their employer. Again, it was admitted by the third respondent initially that it had employed respondents 4 to 41 though it has changed the stand later on to suggest that the ultimate control on the work of the respondents 4 to 41 was with the petitioner and, therefore, it was the petitioner who alone could be said to be the employer.

10. Under the Payment of Gratuity Act, the basic liability rests with the employer. This liability has to be seen in the backdrop of Sec.4 of the said Act which opens with the words:
"Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,- ...

This right of the employee that springs from Sec.4 of the Act would obviously have a corresponding 'duty' in every employer who terminates the service of the employee or with whom the employee was employed.
11. The learned counsel for the third respondent tried to suggest that the third respondent would not be covered in the term 'employer' as defined in Sec.2(f) of the Payment of Gratuity Act and that the authorities were right in holding it to be an 'establishment'. The relevant part of the term 'employer' as defined in Sec.2(f) is as under:
"employer means, in relation to any establishment, factory, mine, oil-field, plantation, port, railway company or shop.
(i) not relevant
(ii) not relevant
(iii) in any other case, the person who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oil-field, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any other name, such person;"

His argument was that the third respondent was not an 'establishment' at all. For that purpose, learned counsel drew my attention to Sec.1(3) of the Payment of Gratuity Act to suggest that the Act applies only to the "establishment" or a factory and that the third respondent could not be said to be an

“establishment” within the meaning of any law in force in relation to shops and establishments in the State.

12. It is not in dispute that the third respondent had employed hundreds of workers and had supplied them to the petitioner. This is all the more necessary because of the wording in Sec.1(3)(b) of the Payment of Gratuity Act, which is as under:

“(3) It shall apply to-

(a) not relevant

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months.

Learned counsel draws the attention of the Court to the fact that the third respondent cannot be called to be an “establishment” at all but since the respondents 4 to 41 were working in the factory run by the petitioner, it would be the petitioner who would be responsible primarily for payment of gratuity under the provisions of the Act.

13. The authorities below have relied on the facts that respondents 4 to 41 were supervising the work of the labourers employed for packing the fertilisers in bags and they were supervising the work of arranging the fertiliser-bags and in the factory site they were supervising all the work except the work of operating the plant. The first authority has gone to the extent of mentioning that the work of the third respondent stops with supplying the labourers to the petitioner establishment and that it was the shift engineer of the petitioner who was to give directions to these workmen. The first authority has then reiterated that the third respondent was a mere contractor and could not be said to be an “establishment” falling under the Contract Labour Act and it was only the petitioner who come within the definition of ‘establishment’ as given in the Contract Labour Act. The authority has also gone to the extent of holding that the petitioner could not be deemed to be the ‘employer’ as the work of the third respondent stops with supplying the labourers but the work of approving or rejecting the work of respondents 4 to 41 as also the allotment of work to them was that of the shift engineer of the petitioner. In short, it is only on this basis that the first authority has held that the third respondent is not an establishment.

14. We will have to therefore see as to whether the third respondent could be said to be an “establishment” under the Shops and Establishment Act as applicable to the State of Tamil Nadu. However, before doing that it will have to be seen as to whether the concerned authorities were right in holding that it was the petitioner who was an establishment and not the third respondent. For this purpose, the authorities have relied on the definition of the term ‘establishment’ as it borrowed in Sec.2(e) of the Contract Labour Act which suggests:

“establishment means

(i) not relevant

(ii) any place where any industry, trade, business, manufacture or occupation is carried on.

There can be no dispute that in so far as the Contract Labour Act is

concerned, the petitioner would certainly be an “establishment”. However, that does not mean that the third respondent contractor, who was basically the principal employer of respondents 4 to 41 would not be covered in this definition. After all, the third respondent contractor also maintains an office and does its business from that office and maintains its records at its office. It is obvious that the third respondent must be engaging the respondents 4 to 41 only from its office. Therefore, the third respondent cannot escape the responsibility even if we rely on the definition of the ‘establishment’ given in the Contract Labour Act. This is not to say that the third respondent is not covered in the definition of Shops and Establishment Act which is as under:

“2(6) establishment means a shop, commercial establishment, restaurant, eating-house, residential hotel, theatre or any place of public amusement or entertainment and includes such establishment as the State Government may by notification declare to be an establishment for the purposes of this Act.”

The term “commercial establishment” is defined as under:

“2(3) commercial establishment means an establishment which is not a shop but which carries on the business of advertising, commission, forwarding or commercial agency, or which is a clerical department of a factory or industrial undertaking or which is an insurance company, joint stock company, bank, broker’s office or exchange and includes such other establishment as the State Governme nt may by notification declare to be a commercial establishment for the purposes of this Act.

It is not disputed that the third respondent contractor carries on its business from its own business premises or that it was drawing commission on the basis of the agreement that it had with the petitioner of supplying the labour. While interpreting this term, a particular view will have to be taken and it will have to be also read with the definition of “establishment”. From the ev idence on record that for all the purposes, the premises of the third respondent could also be viewed as commercial establishment even if it is to be held that respondents 4 to 41 were not required to work in those premises. However, if their employment generated at that place, their records were maintained at that place, and they were probably also at that place, there would be no question of holding that the third respondent is not an “establishment”. Both the authorities have not discussed anything in respect of the nature of the third respondent’s office and have come to a hasty finding that the third respondent was not an “ establishment”. That is by for the only defence on the basis of which the third respondent was let off. I have no doubts that the third respondent can also be said to be an “establishment” and it can be safely held that the Payment of Gratuity Act is applicable to him also. Now if it was the business of the third respondent to arrange for the labours to collect them to have their descriptions and then to provide them for the services to various places like the petitioner’s factory, it cannot be said the premises used for payment of wages and keeping of the records like the wage registers, attendance registers, PF registers, etc. would be a business establishment. In that view, it must be held that the orders of the authorities below in holding that the third respondent was not the “establishment” and hence the petitioner alone was liable to pay the gratuity appears to be clearly incorrect. When we see the orders closely, the only reason why the third respondent was let off is that the third respondent is not an establishment. I have already shown that the finding in that

behalf is clearly incorrect. Once that is the position then, the third respondent becomes the principal employer within the meaning of the Payment of Gratuity Act and the liability of payment of gratuity would clearly be cast against the third respondent alone. Merely because these workers worked at the factory of the petitioner, it would not by itself suggest that the petitioner and only the petitioner was the employer.

15. In this behalf, I was taken through the agreement in between the petitioner and the third respondent. It was tried to be suggested thereupon that since the liabilities were accepted by the petitioner to pay the wages, it should also be held that it would be the petitioner alone who should be held liable to pay the gratuity. I do not think so. In the counter affidavit filed by the third respondent before this Court, it has been accepted that the third respondent was working as the contractor for securing the labour force. The third respondent was also providing the said labour to the petitioner to different work in the petitioner's factory premises. The third respondent tried to suggest that it had committed a mistake (in probably admitting the relationship of master-servant between the third respondent and respondents 4 to 41). The learned counsel also tries to suggest that since the finding has been arrived at in the nature of finding of fact on the basis of the evidence led before the Court, this Court should not disturb that finding. However, what I find is that both the authorities have clearly erred in law in firstly holding the third respondent not be an "establishment" and the whole findings have been affected because of that. I am, therefore, of the clear opinion that the third respondent is an "establishment" and it is the basic responsibility and liability of the third respondent to make the payment of gratuity to respondents 4 to 41 who were engaged by it and who were on its pay-roll. That, however, does not end the problem.

16. Mr. Prasad, relying heavily on Sec.21(4) of the Contract Labour Act points out that where the contractor fails to make the payment of wages within the prescribed period or makes the short payment then, the principal employer becomes liable to make the payment in full or the unpaid wages to the contract labourers employed by the contractor and then to recover the amount so paid from the contractor either by deducting the amounts due and payable to the contractor or as the debt payable by the contractor. Mr. Prasad points out that this Court by its interim order directed the petitioner to deposit in this Court the amount payable by way of gratuity to respondents 4 to 41. He points out that the workers who have retired about 7 to 8 years have remained high and dry without payment of gratuity. He points out that even if it is held that the primarily responsibility lay with the third respondent, the petitioner cannot escape from making the payment of gratuity as it is obvious that the contractor had failed to make the payment. There can be no dispute in this case that there has been a failure on the part of the 3rd respondent contractor to make the payment of gratuity. There can also be no dispute that respondents 4 to 41 were entitled to be paid such a gratuity.

17. However, Mr. AL. Somayaji, learned senior counsel points out that it is only the 'wages' for which the principal employer would be held liable under Sec.21(4) of the Contract Labour Act and that there would

be no question of any other payment like payment of gratuity being foisted against the petitioner. In support of this proposition, learned senior counsel invites my attention to the defition of ' wages' in Payment of Gratuity Act. Sec.2(s) of Payment of Gratuity Act defines 'wages' as under:
"wages means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house-rent allowance, overtime wages and any other allowance."
Learned counsel, therefore, suggests that the payment of gratuity will not come within the definition of 'wages'.

18. The contention of Mr. AL. Somayaji is clearly incorrect because for the purposes of wages since liability arises under Sec.21(4) of the Contract Labour Act, we will have to go to the term 'wages' as defined under the Contract Labour Act, i.e. Sec.2(h) which reads as under:
"wages shall have the meaning assigned to it in clause (vi) of section 2 of the Payment of Wages Act, 1936 (4 of 1936)"
It is, therefore, essential to go to the Payment of Wages Act to see as to what is the real import of the term 'wages' as it is contemplated in Sec.21(4) of the Contract Labour Act.

19. When we go to the definition of 'wages' as defined in Payment of Wages Act, it is as under:
"2. Definitions.--
... ...
(iv) wages means all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes--
(a) not relevant
(b) not relevant
(c) not relevant
(d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions but does not provide for the time within which the payment is to be made;
(e) not relevant
but does not include --
(1) not relevant
(2) not relevant
(3) not relevant
(4) not relevant
(5) not relevant
(6) any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d)"
Learned counsel argues that payment of gratuity is clearly excluded by sub-clause (6) which has been reproduced above. According to the learned counsel, no gratuity could be payable even under clause (d) and, therefore,

sub-clause (6) will apply on all fours to the present case. Reading sub-clause (6) it is clear that gratuity could be excluded from the wages only if such gratuity is not covered in clause (d). The language of sub-clause (6) is very clear. However, the contention of the learned counsel is that gratuity under the Payment of Gratuity Act is not covered by clause (d) at all and in fact, that clause does not refer to the gratuity at all. This contention is obviously incorrect for the simple reason that otherwise there was no occasion for the legislature to mention the term "any gratuity" in subclause (6). The very language of sub-clause (6) suggests that any gratuity which is not covered by clause (d) is excluded from the term " wages". This would presuppose that clause (d) covers some gratuity. Which would that gratuity be is the moot question to be answered. The answer is to be found in the plain language of clause (d) which opens with the words "any sum which by reason of the termination of employment of the person employed is payable under any law, …". There can be no dispute that the termination of employment of respondents 4 to 41 entitled them to receive the payment of gratuity under the law called Payment of Gratuity Act. This clause is complete in itself and, therefore, it can be safely held that the gratuity which is payable under the Payment of Gratuity Act is well covered under clause (d). Learned senior counsel, however, suggests that the subsequent clause starting from the words "contract or instrument" suggests that such law, contract or instrument should not provide for the time within which the payment is to be made and in fact, there is a time limit prescribed in the Payment of Gratuity Act. In my view, such cannot be the import of the last clause. The last clause qualifies only the " contract or instrument" because of the user of the word "provides". Now if the letter "S" is added to the word "provide", it would be only when there is the user of singular subject as against the plural subject. The phrase "contract or instrument", because of the existence of the word "or" would become a singular and, therefore, the verb will have to be used with the addition of the letter "s". But such would not be the position if the word "law," is also to be added. It will then become "law and contract or instrument" in which case, the verb will have to be used as if the subject is plural. Therefore, it is clear that the clause starting from the word "contract" and ending with the word "is to be made" is an independent clause and the qualification given in that clause is only for "contract or instrument" and not for "law". The plain meaning of the clause would be that where any sum is payable on termination of employment of the person under any law (in this case Payment of Gratuity Act), it would be covered under clause (d) and, therefore, it excluded from the operation of subclause (6) and therefore will amount to "wages". Once this construction is accepted, it is clear that it will be the basic responsibility, under Sec.21(4) of the Contract Labour Act, of the petitioner to make the payment of gratuity and the petitioner will have a right to recover that sum from the third respondent contractor because, according to me, the initial responsibility to make the payment of gratuity lies with the third respondent contractor.

20. Accordingly, the petition is allowed to this extent only. Resultantly, the petitioner shall make the payment of gratuity as per the calculations and shall be entitled to recover the same from the third respondent contractor. The petition is disposed of in the light of the above

observations. No costs.

Index:Yes
Website:Yes
Jai

To:

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